RECORD AND BRIEFS

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No. 220141, Original

In The Supreme Court Of The United States

STATE OF TEXAS,

Plaintiff,

v.

STATE OF NEW MEXICO and STATE OF COLORADO,

Defendants.

On Motion to Intervene

TEXAS' BRIEF IN RESPONSE TO ELEPHANT BUTTE IRRIGATION DISTRICT'S MOTION FOR LEAVE TO INTERVENE

STUART L. SOMACH, ESQ.*
ANDREW M. HITCHINGS, ESQ.
ROBERT B. HOFFMAN, ESQ.
FRANCIS M. GOLDSBERRY II, ESQ.
SOMACH SIMMONS & DUNN, PC
500 Capitol Mall, Suite 1000
Sacramento, CA 95814
Telephone: 916-446-7979
ssomach@somachlaw.com
* *Counsel of Record*
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INTRODUCTION

Elephant Butte Irrigation District (EBID) seeks to intervene in this Original Action. The standard for intervention in an Original Action among states is high because it is intended to respect state sovereignty and protect the Supreme Court's limited resources. EBID's motion fails to meet this high standard and should be denied.

STATEMENT

The State of Texas was granted leave to file its Complaint in order to obtain a determination and enforcement of its rights, as against the State of New Mexico, to the waters of the Rio Grande pursuant to the Rio Grande Compact, Act of May 31, 1939, Pub. L. No. 76-96, ch. 155, 53 Stat. 785 (1939) (hereinafter Rio Grande Compact or Compact). (The Rio Grande Compact is reprinted in the Appendix to the Complaint filed by Texas.) *See* Texas' Brief in Support of Motion for Leave to File Bill of Complaint at 1. The United States was allowed to intervene in this action, as a plaintiff, because of the distinct federal interests involved in this case that are best presented by the United States. *See* Motion of the United States for Leave to Intervene as a Plaintiff at 1-2.

New Mexico has moved to dismiss both the Texas and United States complaints. These motions to dismiss have been opposed by both Texas and the

United States; they were at issue long before EBID sought to intervene, and they are still pending.

EBID is not a party to the Rio Grande Compact. EBID fails to take a position as to whether it seeks intervention as a defendant or as a plaintiff. In its Motion for Leave to Intervene (hereinafter EBID Motion), EBID attempts to justify its intervention on the basis that it "asserts different legal arguments concerning the issues raised in this case from the arguments asserted by the other parties ... and ... [it] believes that its intervention would enable the Court to better understand the complicated issues raised in this original jurisdiction action." *See* EBID Motion at 4-5. EBID further asserts that its views on these issues "may be helpful to the Court in addressing the merits of Texas' complaint and New Mexico's motion to dismiss." *See* EBID Motion at 6. While these purposes may justify allowing EBID to participate, as *amicus curiae*, in appropriate circumstances, they are not sufficient to meet the high intervention standard imposed by this Court.

ARGUMENT

I. EBID'S REQUEST FOR INTERVENTION SUFFERS FROM FATAL PROCEDURAL DEFECTS

EBID's Motion fails to include a proposed pleading that sets forth its legal position. The Federal Rules of Civil Procedure serve as a guide in this case. *See* Sup. Ct. R. 17.2. Federal Rule of Civil Procedure 24(c) requires that a motion to intervene "state the grounds for intervention and be accompanied by a pleading that sets out the claim or defense for which intervention is sought."[1] Fed. R. Civ. P. 24(c). Without the proposed pleading, it is impossible to ascertain EBID's position with respect to each claim in the existing action, and EBID's Motion merely becomes an occasion to argue its broad views about a case to which it is not a party. EBID elected not to file *amicus curiae* briefs on either Texas' Motion for Leave to File Bill of

[1] Although some courts take a lenient approach to the Federal Rule of Civil Procedure 24(c) requirement that a motion to intervene include a proposed pleading (*see, e.g., Beckman Indus., Inc. v. Int'l Ins. Co.*, 966 F.2d 470, 474 (9th Cir. 1992) [excusing the requirement where the intervention motion "fully stated the legal and factual grounds for intervention"]), such an approach is only suitable where the movant describes with specificity its position on the claims and defenses in the existing matter. As explained below, EBID's Motion and EBID's Memorandum of Points and Authorities in Support of Motion for Leave to Intervene (EBID Brief) do not serve as a suitable substitute for a proposed pleading.

Complaint or New Mexico's Motion to Dismiss. No Supreme Court rule provides non-parties the occasion to reargue positions or raise matters that could have been briefed at the time of original briefing. As a result, EBID's Motion is defective both for its failure to attach a proposed pleading, and as an untimely attempt to express *amicus* views on past due briefing. Accordingly, the Court should deny EBID's Motion for Leave to Intervene, and should not consider any matter raised by EBID regarding the merits of Texas' Complaint.

II. EBID'S REQUEST FOR INTERVENTION SHOULD BE DENIED ON ITS MERITS

A. Standard for Intervention

The appropriate standard for intervention in original actions by non-state entities is set forth in *New Jersey v. New York*, 345 U.S. 369 (1953) (*New Jersey*). Under this standard, a non-state entity is only permitted to intervene where: (1) it has "some compelling interest in [its] own right," (2) that interest is different from "his interest in a class with all other citizens and creatures of the state," and (3) that interest is "not properly represented by the state." *Id.* at 373; *South Carolina v. North Carolina*, 558 U.S. 256, 266 (2010) (*South Carolina*). The Court has acknowledged that this is a high standard "and appropriately so" as it is intended to respect state sovereignty and protect the Supreme Court's limited resources. *South Carolina* at 267.

As the Court explained in *New Jersey*, "original jurisdiction against a state can only be invoked by another state acting in its sovereign capacity on behalf of its citizens." *New Jersey*, 345 U.S. at 372. The doctrine of *parens patriae* recognizes "the principle that the state, when a party to a suit involving a matter of sovereign interest, 'must be deemed to represent all its citizens.'" *Id.* This principle "is a necessary recognition of sovereign dignity, as well as a working rule for good judicial administration. Otherwise, a state might be judicially impeached on matters of policy by its own subjects, and there would be no practical limitation on the number of citizens, as such, who would be entitled to be made parties." *Id.* at 373.

Intervention in original actions has only been allowed in "compelling" circumstances. *New Jersey*, 345 U.S. at 373. The Court has a long history of "rejecting attempts by nonsovereign entities" to intervene in interstate water disputes. Until recently, in original actions involving interstate water disputes, the Supreme Court had only granted intervention to the United States and to Indian tribes. *South Carolina*, 558 U.S. at 277, 281-83. As Chief Justice Roberts explained in his dissent in *South Carolina*:

> The reason is straightforward: An interest in water is an interest shared with other citizens, and is properly pressed or defended by the State. And a private entity's interest in its particular

> share of the State's water once the water is allocated between the States, is an "intramural dispute" to be decided by each State on its own.
>
> *Id.* at 279 (Roberts, C.J. dissenting in part).

The Supreme Court has granted intervention in an interstate water dispute to a party other than the United States or an Indian tribe in only one case. That case provides for a limited exception where a unique set of circumstances is present. In *South Carolina* the Court reaffirmed the rule for intervention enunciated in *New Jersey*, but held that two of the three non-state parties were entitled to intervene under that high standard. *South Carolina*, 558 U.S. at 256. The Court allowed for the intervention of the Catawba River Water Supply Project (CRWSP), a bi-state entity that was jointly owned, regulated by, and provided water to one county in North Carolina and one county in South Carolina. *Id.* at 261. The Court found that the CRWSP had a "compelling interest in protecting the viability of its operations, which are premised on a fine balance between the joint venture's two participating counties." *Id.* at 270. The Court further allowed Duke Energy to intervene. *Id.* at 271. Duke Energy operated eleven dams and reservoirs (six in North Carolina, four in South Carolina, and one on the border between the two states) that controlled river flow and provided hydroelectric power to the region. *Id.* at 261. The

Court found that equitable apportionment of the Catawba River would need to take into account Duke Energy's water needs to power the region. *Id.* at 272. In addition, there was no other similarly situated entity on the river, setting Duke Energy's interests apart from all others. *Id.* The Court, however, denied the City of Charlotte's motion to intervene on the grounds that North Carolina, as the sovereign, would adequately protect the City's interests, and noted that Charlotte did not have interests on both sides (i.e., in both states) of the dispute. *Id.* at 274-75.

This Court's decisions instruct that only the United States, Indian tribes, or other uniquely situated entities, such as those that have direct bi-state interests (e.g., Duke Energy or the CRWSP), will be allowed to intervene in an Original Action, such as this one. Because interstate water disputes are cases "between States, each acting as a quasi-sovereign and representative of the interests and rights of her people," the States are presumed to speak in the best interests of their citizens as a whole, and intervention is not permitted where a entity wholly located and operating within a single state seeks to inject itself into the interstate dispute. *Wyoming v. Colorado*, 286 U.S. 494, 508-09 (1932).

B. EBID Has Not Met the High Standard for Intervention

EBID claims that its "significant responsibilities" with respect to the Rio Grande

Project provide it with the "compelling interest" necessary for the Court to grant intervention. However, each of these "responsibilities" arise either out of EBID's role as a user of water in New Mexico, or as an entity that contracts for water from the United States. Such interests are not unique and are insufficient to support EBID's intervention.

Additionally, EBID argues that even though its interests and the State of New Mexico's interests converge in most respects, EBID's interests are not and cannot be represented by New Mexico. *See* EBID Brief at 24-27. EBID explains that it obtains its water through the Rio Grande Reclamation Project (Rio Grande Project) and it has contracts with the United States. EBID also argues it is entitled to intervene because New Mexico has challenged the 2008 Operating Agreement to which EBID is a party.

A fundamental defect in EBID's position is that it focuses on various contracts and agreements related to the Rio Grande Project as opposed to the Compact claims that Texas and the United States have pled in this original jurisdiction action. Texas brought this action against New Mexico to vindicate Texas' sovereign rights to the waters of the Rio Grande. Texas did not bring suit against the United States (or EBID) over the operation of the Rio Grande Project. While EBID might want to litigate these contract issues in this Court, they are simply not the subject of this litigation. While understanding these various contracts and

agreements may be important to resolving the instant dispute, this does nothing to transform EBID's interests to those of an appropriate intervenor.

1. EBID Does Not Have a Compelling Interest in Its Own Right Apart from Its Interest in a Class with Other Citizens of New Mexico

EBID's interest in this litigation is that of a user of water. There can only be two bases for that interest. Either it emanates from New Mexico state law, or it emanates from EBID's contracts with the United States for Rio Grande Project water. It is difficult to discern from where EBID believes its interest emanates. To the extent that it emanates from New Mexico state law, EBID's interest in Rio Grande water is an interest shared with other citizens in New Mexico and is therefore "properly pressed or defended by the State." *South Carolina*, at 279.

EBID, like all other water users in New Mexico, wants its interest in Rio Grande water protected. EBID's interest, to the extent it emanates from state law, is distinguishable from those of Duke Energy and the CRWSP who were allowed to intervene in *South Carolina*. EBID is solely a creature of New Mexico state law, is located wholly within New Mexico, and serves no lands outside of New Mexico. EBID's interest is indistinguishable

from those of the City of Charlotte. EBID, like the City of Charlotte, merely occupies a class of affected New Mexico users of water and the significance of EBID's responsibilities with respect to New Mexico's allocation of Rio Grande water does not set it apart from other members of this class. In *South Carolina*, the Court found such interests insufficient to justify intervention and it should do so here.

2. EBID's Interests Are Adequately Represented by Either the State of New Mexico or the United States

EBID admits that its views on a whole host of issues, in fact, converge with the State of New Mexico. *See* EBID Brief at 24. Conversely, in those areas where it asserts that its interests diverge with New Mexico, EBID conveniently ignores the fact that those divergent interests converge with the interests of the United States, a party to this litigation. The United States has primary responsibility for the Rio Grande Project, including the obligation to protect the operation of the Project and the delivery of water from the Project. Moreover, the United States is a party to each of the contracts and agreements that EBID cites in support of its position, including the 2008 Operating Agreement. None of these contracts

or agreements, in any way, supersedes the Compact.[2] Additionally, the mere existence of these contracts and agreements is not an appropriate basis for intervention.

EBID raises the dispute it has with New Mexico over drainage or seepage water, and whether that water belongs to the Rio Grande Project, as a further argument against New Mexico protecting EBID's interests. In making this argument, EBID again ignores the fact that the United States is a party to the litigation and is itself opposed to the New Mexico view on seepage and drainage and can, therefore, represent EBID's interests on this issue.[3]

EBID argues that it, not the United States, has the primary responsibility for the Rio Grande Project. EBID, however, fails to offer any support for the notion that the United States has, in any way, abrogated its role with respect to the Rio Grande Project.

EBID cites to *Nevada v. United States*, 463 U.S. 110 (1983) (*Nevada*) for the proposition that water users own the right to water in Reclamation Projects and, thus, have a unique interest in

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[2] In the event that the contracts and agreements become material, the United States is competent to address these issues and EBID will be free to file an *amicus* brief.

[3] To the extent that EBID's views with respect to groundwater differ from the United States, they "converge" with the views of New Mexico.

preserving those water rights. EBID Brief at 22-23. The holding of *Nevada*, however, is predicated on the assumption that the water rights at issue were obtained from and are based upon state law. Texas, however, has alleged that all of the water delivered into Elephant Butte Reservoir has been apportioned to Texas, subject to the United States' contract with EBID and the United States' delivery obligation to the nation of Mexico. EBID's rights are solely based upon its contract with the United States and not based on New Mexico state law.[4] The United States is a party to this litigation and is capable of protecting these contract rights. To the extent EBID's rights to water are subject to New Mexico state law only New Mexico has standing in this Court to assert those rights. *See Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938) (*Hinderlider*).

In *Hinderlider*, the Colorado State Engineer appealed from an adverse judgment of the Colorado Supreme Court, in which that court had held, in effect, that the State Engineer could not curtail water rights in Colorado for the purposes of complying with the obligations of the State of Colorado under the La Plata River Compact. The ditch company asserted that the La Plata River

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[4] These issues were extensively briefed by Texas in its opposition to New Mexico's motion to dismiss. *See, e.g.*, Texas' Brief in Response to New Mexico's Motion to Dismiss Texas' Complaint and the United States' Complaint in Intervention at 9-11, 19-20, 22, 27-29, 43-45, 53, and 59-62.

Compact violated the vested water right granted to it by the January 12, 1898 adjudication decree, and that the vested water right so awarded could not be modified or diminished except by condemnation and payment of just compensation. Since no condemnation proceeding had been commenced, the company had successfully argued to the lower court that the state was without power to curtail its water right in order to comply with the La Plata River Compact. *La Plata River & Cherry Creek Ditch Co. v. Hinderlider*, 93 Colo. 128, 25 P.2d 187 (Colo. 1933); *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 101 Colo. 73, 70 P.2d 849 (Colo. 1937).

On appeal, the United States Supreme Court assumed that the water right adjudicated under the decree awarded the ditch company a property right that was indefeasible insofar as Colorado and its citizens and any other person claiming water in Colorado were concerned. The Court went on to hold, however, that the Colorado water right decree could not confer upon the ditch company rights in excess of Colorado's share of the waters of the stream, and Colorado's share was only an equitable portion thereof. *Hinderlider*, 304 U.S. at 106-07. In other words, state-created water rights only attach to that portion of an interstate stream that is equitably apportioned to the state, and the state court decree is not binding on citizens of another state who claim the right to divert water from the stream under that other state's equitable share of the interstate stream. When an apportionment of the waters of the interstate stream is made by

compact, the apportionment is binding on the citizens of each state and all water claimants, including water right owners whose rights predate the compact. *Id.* at 106; *see also Elephant Butte Irrigation Dist. v. Regents of N.M. State Univ.*, 115 N.M. 229, 235-36, 849 P.2d 372 (Ct. App. 1993) (citing *Hinderlider*, 304 U.S. 92) (stating that "[t]he apportionment of water under state compacts is binding on private water claimants"). No court can order relief inconsistent with an interstate compact. *Texas v. New Mexico*, 462 U.S. 554, 564 (1983).

The State of New Mexico, in signing the Rio Grande Compact in 1938, recognized that the storage and delivery of water by the Rio Grande Project was an essential element of the equitable apportionment agreed to in the Compact, and obligated itself to deliver water to Texas through the Rio Grande Project. Water would be stored, released, and delivered to Texas subject to Reclamation's contracts in New Mexico, i.e., EBID's contract, and the United State's treaty obligation to Mexico. New Mexico agreed not to interfere with Rio Grande Project operations that existed when the Compact was executed in 1938. The Rio Grande Compact is both federal law and New Mexico state law. As explained by *Hinderlider*, New Mexico's Rio Grande Compact apportionment is binding on all citizens of the state, including EBID and, therefore, EBID's interests are adequately represented either by New Mexico or by the United States.

3. EBID's Arguments Relating to the Issues in This Case Are Not Grounds for Intervention and, in Any Event, Should Be Disregarded by the Court

EBID asserts that it meets the high standard for intervention because it has "different legal arguments concerning the issues raised in the case from arguments asserted by [others already parties to the litigation] ... and that ... its intervention would enable the Court to better understand the complicated issues raised in this original jurisdiction action." *See* EBID Motion at 4-5. However, providing "different legal arguments" has never been a ground for intervention in an Original Action. To the extent that EBID would like to assist the Court in better understanding the issues in this case, EBID can move to properly participate as *amicus*.

EBID's "assistance" at this juncture is based upon the absurd proposition that although the Rio Grande Compact effects an equitable apportionment of the waters of the Rio Grande, and that the Compact was entered into between the States of Colorado, New Mexico and Texas, it "does not effect an equitable apportionment of water among the three states." EBID Brief at 9. EBID then argues that while Colorado and New Mexico are both apportioned Rio Grande water, "[i]n short, the Compact does not apportion *any* Rio Grande water to

Texas."[5] EBID Brief at 10. Instead, EBID argues that the "third apportionment" of water was to the Rio Grande Project and, in essence, to EBID, which, pursuant to contracts entered into after the Compact was executed, allows EBID to provide water to a district in Texas. EBID then describes in some detail these contracts. EBID Brief at 32-36.[6]

It is undisputed that these contracts exist and they are important, but the instant action does not directly involve any of them. There simply is no evidence that these contracts were intended to (or could) change the Compact. EBID would relegate the Compact to an inferior position to contracts to which none of the sovereign states involved in this litigation is a party. This argument also flies in the face of the plain language of the Compact which confirms that it was entered into "for the purpose of effecting an equitable apportionment of the [waters of the Rio Grande]" among the three signatories (Rio Grande Compact, Preamble at App. 1), and ignores

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[5] Later in its brief, however, EBID admits "[t]he Rio Grande Compact addressed the rights and duties of the signatory parties – New Mexico, Texas and Colorado – to surface waters of the Rio Grande ...." EBID Brief at 13-14.

[6] These contracts are the 1938 Contract among EBID, El Paso County Water Improvement District No. 1 (EP#1), and the United States, the so-called "Takeover Contract" executed in 1980 between the United States and EBID, and the 2008 Operating Agreement among EBID, EP#1, and the United States.

the purpose and meaning of interstate compacts in general.[7]

EBID also asserts that the United States acquired the right to all unappropriated water in the Rio Grande and its tributaries "for the benefit of EBID members." EBID Brief at 2. EBID's statement ignores entirely that the Rio Grande Project was also intended to benefit lands in Texas. *See, e.g.*, Rio Grande Reclamation Project Act, Act of February 25, 1905, Pub. L. No. 58-104, ch. 798, 33 Stat. 814 (authorizing the Rio Grande Project to provide water for irrigation lands in both southern New Mexico and western Texas). Ignoring the State of Texas and lands within Texas that were to benefit from the Rio Grande Project, and later from the Compact, is a recurring theme in EBID's motion.

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[7] An interstate compact is a voluntary agreement between states enacted into law in the participating states upon federal congressional approval. *Black's Law Dictionary* 318 (9th ed. 2009). A congressionally approved interstate compact has the functional status of federal law. *New Jersey v. New York*, 523 U.S. 767, 811 (1998). Two or more states often use interstate compacts to allocate the waters of interstate rivers and avoid lengthy litigation. The Supreme Court endorsed water allocation compacts when it noted "[a]bsent an agreement among the States, disputes over the allocation of water are subject to equitable apportionment by the courts, *Arizona v. California*, 460 U.S. 605, 609 (1983), which often results in protracted and costly legal proceedings." *Tarrant Reg'l Water Dist. v. Herrmann*, ___ U.S. ___, 133 S. Ct. 2120, 2125, 186 L. Ed. 2d 153, 162 (2013).

As further justification for its intervention, EBID also cites to two existing pieces of litigation to which it is a party. The first is *New Mexico ex rel. State Eng'r v. Elephant Butte Irrigation Dist., et al.*, No. CV-96-888 (N.M. Third Jud. Dist. Ct., N.M.), in which the scope and extent of the United States' water rights within New Mexico are being litigated. While this litigation may be important to EBID, that litigation has nothing to do with Texas' Compact rights which are at issue in the instant action.

The second case cited by EBID is *New Mexico v. United States*, No. 11-cv-00691 (D. N.M. Dec. 20, 2011), in which the validity of the 2008 Operating Agreement is being challenged by New Mexico. Texas is not a party to that litigation (or to the 2008 Operating Agreement), but both EBID and the United States are.[8] That action was stayed, pending the outcome of this Original Action to insure that the district court's decision comports with the Compact.

EBID, in its motion, attempts to re-write this litigation to make it entirely about EBID. While EBID may have a Reclamation contract with the United States, it nonetheless is still merely an irrigation district wholly within New Mexico and is not, in any way, a party to the Compact that is the

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[8] While Texas is not a party to the 2008 Operating Agreement, it has no reason to believe that it is inconsistent with the Compact.

actual subject of this action. No matter how hard EBID attempts to skew the facts, it simply is not a sovereign party to the Rio Grande Compact, and is not a proper party to this litigation.

Finally, EBID suggests that the Texas Complaint should be dismissed and that Texas should be allowed to amend its Complaint to comport with EBID's convoluted theories, including that EBID and not Texas was apportioned water under the Compact. *See* EBID Brief at 35-36. To the extent that EBID believes that the Texas Complaint should be dismissed, it could have sought leave to file an *amicus* brief in support of the New Mexico motion to dismiss. It did not do so and the time for doing so is long past. In any event, the argument itself is not a basis upon which intervention can be granted.

CONCLUSION

Based upon the foregoing, the State of Texas respectfully requests that EBID's Motion for Leave to Intervene be denied.[9]

Respectfully submitted,

STUART L. SOMACH, ESQ.*
ANDREW M. HITCHINGS, ESQ.
ROBERT B. HOFFMAN, ESQ.
FRANCIS M. GOLDSBERRY II, ESQ.
SOMACH SIMMONS & DUNN, PC
500 Capitol Mall, Suite 1000
Sacramento, CA 95814
Telephone: 916-446-7979
ssomach@somachlaw.com

**Counsel of Record*

January, 2015

[9] In the event the Court grants EBID's Motion, entities within Texas that are similar to EBID should also be allowed to intervene.